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No. 1254

In the Supreme Court of the United States

OCTOBER TERM, 1944

LILLIAN BOEHM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 81–89) is not reported. The opinion of the Circuit Court of Appeals (R. 102–106) is reported at 146 F. 2d 553.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 10, 1945. (R. 122.) The petition for a writ of certiorari was filed May 10, 1945. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in finding as a fact that certain stock with respect to which the taxpayer claimed a loss deduction in 1937 did not become worthless in that year.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> * * * * *
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business;
>
> * * * * *

STATEMENT

In 1929 the taxpayer purchased 1,100 shares of the Class A stock of The Hartman Corporation, hereinafter called Hartman, for $32,440. Hartman was incorporated in 1916 in the State of Virginia and acquired the capital stock of the Hartman Furniture and Carpet Company, hereinafter called Hart-

man (Illinois) and its affiliates, which were engaged in the business of selling furniture, carpets and household goods. (R. 82.)

The Hartman balance sheet of December 31, 1931, and a statement of its board of directors dated April 4, 1932, addressed to its stockholders, indicated the adverse business effect of the depression and the corrective measures being taken by the directors. (R. 57–62, 82.) A letter from the president of Hartman to its stockholders, dated May 4, 1932, stated that business had not shown any improvement. (R. 64, 82.)

In June, 1932, equity receivers were appointed for Hartman by the District Court of the United States for the Northern District of Illinois, Eastern Division. The receivers entered into possession of the property of Hartman and continued its business of buying and selling furniture and other household articles from the time of their appointment until on or about May 26, 1933. (R. 82.)

In 1933 the stockholders of Hartman were given the right to subscribe for debentures and capital stock of Hartman's, Inc., a new corporation organized in that year to purchase at a bankruptcy sale the assets of Hartman (Illinois), the wholly-owned subsidiary of Hartman. The taxpayer did not subscribe, and acquired no interest in that company. (R. 83.)

On August 10, 1934, the receivers of Hartman filed a report listing as assets $39,593.13 in cash and a suit pending against the directors (hereinafter

referred to as the Graham suit), and as liabilities, total outstanding claims of $707,430.67. They recommended that claims totaling $630,574.57 be allowed. The court approved the report and also awarded $8,500 as compensation to receivers and attorneys. (R. 83.) In a second report filed July 11, 1935, the liabilities were again listed at $707,430.67, but the assets were listed as less than before or $27,192.51 in cash, and the Graham suit. The receivers recommended that a four per cent dividend be paid on the claims of $630,574.57 allowed. The court adopted the report and recommendations, and on August 26, 1935, one of the receivers was released from further duties. (R. 83.)

On September 30, 1937, the remaining receiver filed a final report. The sole remaining asset was cash in the amount of $1,909.94. Claims totaled $630,574.57. It was recommended that compensation totaling $900 be allowed the receiver and counsel and that the remainder be distributed to the creditors. The court adopted the recommendations and discharged the receiver by an order dated September 30, 1937. (R. 84.)

The Graham suit was instituted December 16, 1932, in the Supreme Court of the State of New York. The plaintiffs were the taxpayer and eight other stockholders of Hartman. The defendants were the Hartman corporation and nine members of the company's board of directors, all of whom were financially responsible and several of whom

were prominent businessmen. The plaintiffs sued (R. 84)—

> on behalf of themselves as stockholders of The Hartman Corporation and on behalf of the said Company and all other stockholders of said Company similarly situated, who may join with the plaintiffs in, and contribute to the expenses of this suit.

The plaintiffs charged the defendant directors with waste, extravagance, mismanagement, neglect and fraudulent violation of their duties as officers and directors, demanded an accounting and that the defendants pay into the treasury of the corporation the amount of the loss and damage sustained by it by reason of their wrongful acts. (R. 85.) During the years 1933 to 1936, inclusive, extensive examinations were made of several of the defendants. The taxpayer and her co-plaintiffs paid expenses and counsel fees, pursuant to an order of the court, of about $800, and the plaintiffs expended approximately $2,000, exclusive of fees, in defraying expenses of counsel, stenographic costs and printing charges. (R. 86.)

At the conclusion of the examinations and shortly before the trial, negotiations were commenced for a settlement of the action and on February 20, 1937, a settlement was consummated. Under its terms the defendant directors paid the taxpayer and the other plaintiff stockholders $50,000 in full discharge of their claims and cause of action, and the taxpayer and the other stockholders released all their rights and claims arising out of the acts committed by the defendants

as alleged in the complaint. The suit was dismissed on May 14, 1937. (R. 86.) The taxpayer's proportionate share of the $50,000, after payment of counsel fees and expenses, amounted to $12,500. (R. 86–87.)

The taxpayer claimed a deduction from gross income in her 1934 income tax return in the amount of $32,302 as a loss due to the worthlessness of her 1,100 shares of Hartman Class A stock. The Commissioner denied the deduction on the ground that the stock did not become worthless in 1934. (R. 87.)

In her income tax return for 1937 the taxpayer claimed a deduction from gross income in the amount of $19,940 as a loss due to the worthlessness of her Hartman Class A stock, which amount represents the difference between the cost of such stock and the $12,500 paid taxpayer in the settlement referred to above. The Commissioner denied the deduction. (R. 87.) The Tax Court found as a fact that the taxpayer's stock in Hartman did not become worthless in 1937 (R. 87) and sustained the Commissioner (R. 87–88). The Circuit Court of Appeals affirmed. (R. 102–106.)

ARGUMENT

The question here presented, and the conflict asserted by the taxpayer, are the same as in *Superior Coal Co.* v. *Commissioner*, No. 950, this Term, in which certiorari was denied on April 2, 1945.

The Tax Court here found that the taxpayer's stock did not become worthless in 1937 (R. 87), and the court below correctly held that this finding

was supported by substantial evidence. (R. 103.) The determination of the Tax Court is therefore dispositive of the sole issue in the case, for the question whether property became worthless in a particular year is a question of fact exclusively within its province. *Lucas* v. *American Code Co.*, 280 U. S. 445; *United States* v. *White Dental Co.*, 274 U. S. 398.

Here, as in the *Superior Coal Co.* case, no substantial conflict exists with the decision of the Court of Appeals for the District of Columbia in *Smith* v. *Helvering*, 141 F. 2d 529. Assuming, *arguendo*, that there is some validity in the "subjective test" propounded in the *Smith* case for determining the tax year in which property becomes worthless, the decision of the Tax Court is not at variance with that rule, and its application here would call for no different result. The "subjective" factor upon which the taxpayer relies is that she expended some fraction of $2,800 as a stockholder in defraying the expenses of the Graham suit. The record does not indicate that the Tax Court disregarded this factor; on the contrary, the Tax Court made a finding upon it. (R. 86.) Other facts found by the Tax Court, however, clearly indicate subjective determination of worthlessness by the taxpayer long before 1937; the taxpayer claimed a loss deduction asserting the worthlessness of the stock here involved in her income tax return for 1934. (R. 87.) Even if objective facts were to be eliminated from consideration, the subjective factors would merely lead to conflicting inferences of fact; and it was the exclusive function

of the Tax Court to choose between them. In any view of the matter, the decision of the Tax Court was supported by substantial evidence and is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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